IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-873

SHEARN MOODY, JR., and
JOHN S. BLEKER,

Petitioners,

VS.

THE STATE OF TEXAS, et al.,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

FRANK G. NEWMAN
NEWMAN, SHOOK & NEWMAN
A Professional Corporation
4330 Republic National Bank Tower
Dallas, Texas 75201

FREDERICK J. LAWSON
Union Bank Plaza, Suite 414
15233 Ventura Boulevard
Sherman Oaks, California 91403

Attorneys for Petitioners
SHEARN MOODY, JR., JOHN S. BLEKER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-873

SHEARN MOODY, JR., and

JOHN S. BLEKER,

Petitioners,

VS.

THE STATE OF TEXAS, et al.,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

Now come the Petitioners, SHEARN MOODY, JR., and JOHN BLEKER, and file their Reply to the Brief in Opposition to Petition for Writ of Certiorari filed by the Respondents in the above-entitled and numbered cause. In support hereof, the Petitioners would respectfully show this Honorable Court the following:

I.

THE POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF EMPIRE WERE DENIED THE EQUAL PROTECTION OF THE LAWS SINCE THE TEXAS ANCILLARY RECEIVERSHIP PROCEEDING WAS NOT INSTITUTED IN ACCORDANCE WITH SECTION 13 OF ARTICLE 21.28 OF THE TEXAS INSURANCE CODE.

The constitutional infirmities inherent in the Texas Ancillary Receivership proceeding involving Empire Life Insurance Company of America ("Empire") are evident at the outset. The Texas Ancillary receivership proceedings were initiated in total defiance of the statutory requirements of Section 13, Article 21.28 of the Texas Insurance Code. (See Pet. pp. 57-65). As a result, the ancillary receivership court lacked jurisdiction to approve the reinsurance treaty and by proceeding it clearly denied Empire's policyholders, stockholders and creditors the equal protection of the laws guaranteed by the Fourteenth Amendment.

In the regulated field of insurance state courts cannot arbitrarily ignore statutory procedure. When an insurance company with over 40,000 policyholders is placed in receivership, statutory procedures must be followed in order to safeguard the rights of all interested parties. At a minimum, equal protection of the laws means the fair and consistent enforcement of the laws. Such total defiance of established statutory procedure is inexcusable and is totally contrary to the equal protection clause of the Fourteenth Amendment.

The Respondents' assertion that the issue is of no consequence since "the ancillary receiver never had jurisdiction over any of Empire's assets . . ." (Br. p.20), not only contradicts their admission that the Texas Ancillary Receiver had jurisdiction over most of Empire's assets (Br. p.3) but is also grossly erroneous as a matter of laws. See, Texas Insurance Code, Section 13, Article 21.28. *City Bank Farmers Trust Co. vs. Schnader*, 293 U.S. 112 (1934).

II.

THE APPROVAL OF THE TREATY OF ASSUMPTION AND BULK REINSURANCE BY THE TEXAS ANCILLARY RECEIVERSHIP COURT WITHOUT NOTICE TO THE POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF EMPIRE SITUATED WITHIN THE STATE OF TEXAS DEPRIVED THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT.

Not only was the ancillary receivership initiated in defiance of statutory procedure, but the appointment of the permanent ancillary receiver and the approval of the reinsurance treaty occurred without notice to Empire's policyholders, stockholders, and creditors in Texas. Petitioner Bleker pointed out in his Plea in Intervention that as a policyholder he had absolutely no notice whatsover of the appointment of any ancillary receiver for Empire in the State of Texas. He requested that the proceedings be abated until all policyholders were notified and given an opportunity to appear at the hearing pertaining to the Reinsurance agreement. *His request was denied!*

Surprisingly enough, the Respondents have asserted that the absence of notice with regard to the hearing on the treaty is insignificant since the Petitioners were present at the hearing and since informing the policyholders of said hearing may have caused a run on cash reserves. The obvious response to these arguments is, of course, that the Petitioners have standing to assert the deprivation of constitutional rights on behalf of the policyholders, stockholders and creditors who were not notified since the latter were denied an opportunity to appear and protect their rights. Further, the argument that the policyholders would immediately cash in their policies upon receipt of notice implies the absence of any ability on the part of the policyholders to make a rational choice as to whether they should stay with the company. Certainly those policyholders who would have chosen to cash in their policies and reject reinsurance were entitled to appear and challenge the manner in which their claims would be handled and the sufficiency of the $2,000,000.00 fund set aside to pay creditors' claims. The ancillary receiver's admission that Petitioner Moody alone had filed claims totalling $2,000,000.00 (R. 164) is clear evidence that the fund was insufficient. The possibility that upon receipt of notice some of the policyholders would have cashed in their policies is certainly no justification for withholding notice from all of the policyholders.

The Respondents also asserted that notice to Empire's stockholders, policyholders and creditors was not necessary in the ancillary proceeding because notice had been given with regard to the Domiciliary hearing in Alabama. Evidently, the Texas Court was not persuaded that it should simply defer to the

Alabama Court's approval of the reinsurance agreement, since it did conduct a hearing on the reinsurance agreement. Unfortunately, no notice of said hearing was given to Empire's policyholders, stockholders and creditors within the State of Texas. Since a majority of Empire's stockholders, policyholders and creditors resided in Texas, and since it is clearly less burdensome for them to attend a hearing in the State of their residence, the failure of the Texas Ancillary Receivership Court to provide them with notice and an opportunity to appear at the hearing effected a significant deprivation of their property without the due process of law guaranteed by the Fourteenth Amendment.

III.

THE PETITIONERS HAVE BEEN DENIED THE RIGHT OF DUE PROCESS IN THAT THE RECEIVERSHIP COURT DEPRIVED THEM OF A JUST EQUITABLE FAIR AND IMPARTIAL HEARING IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Petitioners' fundamental right of due process was directly violated by the Ancillary Receivership Court, since that Court simply ratified authorized and confirmed any and all pertinent demands and requests of the Receiver. He did so under the misconception that he merely served as a statutory "rubber-stamp" of the State agency in clear and direct violation of the Constitutional protectives of due process and separation of powers.

In response to the foregoing argument, the Respondents have asserted that the issue was not specifically asserted in the pro-

ceedings below. The Petitioners would point out that this Court has made it perfectly clear that it may of its own Motion notice errors to which no exception has been taken, if such errors seriously affect the fairness, integrity or public reputation of judicial proceedings. See, *Johnson vs. U.S.*, 63 S.Ct. 549, 318 U.S. 81 (1943). This Court clearly has jurisdiction to consider "plain error" not specifically assigned as error below. *Sibbach vs. Wilson & Co.* 61 S.Ct. 422, 312 U.S. 1 (1941); *Mahler vs. Eby*, 44 S.Ct. 283, 264 U.S. 32 (1924); *U.S. vs. Pena* 20 S.Ct. 165, 175 U.S. 500 (1899).

IV.

THE TRIAL COURT WAS WITHOUT JURISDICTION TO HEAR AND DECIDE THE CASE IN THAT IT GAVE FULL, FAITH AND CREDIT TO AN ALABAMA JUDGMENT WHICH WAS BASED UPON AN UNCONSTITUTIONAL ALABAMA STATUTE.

Before the ancillary receivership court could entertain the proposal to reinsure Empire it had the duty of determining whether Empire was actually insolvent. The court's refusal to admit evidence on the issue and its decision to give full, faith and credit to the Alabama decree deprived Empire's policyholders, stockholders and creditors of their property without due process of law.

Empire's alleged statutory insolvency occurred as a result of the Alabama Insurance Commissioner's arbitrary devaluation of its life estate interest in the Libbie Shearn Moody Trust from $14,000,000.00 to approximately $4,250,000.00, after the trust interest had been carried at the $14,000,000.00 value for approximately seven years. The devaluation was predicated upon Section 745(13) of the Alabama Insurance Code which is devoid of any guidelines and which provides the Alabama Insurance Commissioner with unlimited and unbridled discretion as to the valuation of assets. (See Pet. pp. 24-27)

It is the general principle of statutory law that a statute must be definite and certain to be valid. Furthermore, it has uniformly been held that a law violates due process if it is so vague and standardless that it leaves the public uncertain as to the conduct thereby prohibited, or leaves judges and juries free to decide without any legally fixed standards, what is prohibited and what is not in each particular case. *Giaccio v. State of Pennsylvania*, 387 U.S. 399, 86 S.Ct. 518. It is also clear that an unconstitutional statute is void and unenforceable and has no legal effect. *Miller v. Davis*, 136 Tex. 299, 150 S.W.2d 973 (1941) *Colden v. Alexander* 141 Tex. 134, 171 S.W.2d 928 (1943).

The ancillary receivership court therefore erred in giving of full, faith and credit to the void Alabama decree and by failing to make an independent determination on the issue of insolvency, it lacked jurisdiction to approve the Treaty. The erroneous recognition of the void Alabama decree also prevented the Petitioners from raising the constitutional issues pertaining to the constitutionality of §745(13) and the deprivation of vested contractual rights caused by the devaluation of the trust interest.

Section 810 of the Alabama Insurance Code, entitled "Savings Clause," indicates that the Act shall not impair rights accruing prior to its effective date. Section 745(13) of the Code became effective in 1972. Numerous policyholders, stockholders

and creditors acquired vested contractual rights prior to 1972 in reliance on the $14,000,000.00 valuation assigned to the trust interest. The application of §745(13) in 1972 to effect a $10,000,000.00 decrease in the value of the interest clearly effected a substantial deprivation of vested property rights in violation of §810 as well as Article I, Section 10 of the U.S. Constitution.

V.

THE TREATY OF ASSUMPTION AND BULK REINSURANCE TREATS DIFFERENTLY THOSE POLICYHOLDERS AND CREDITORS WHO ARE SIMILARLY SITUATED AND FAILS TO TREAT THOSE WHO ARE DIFFERENTLY SITUATED IN A MANNER CONSISTENT WITH THEIR RIGHTS.

The Petitioners have attacked with specificity the unlawful discrimination effectuated by the Treaty of Assumption and Bulk Reinsurance. (Pet. pp. 33-57). Since the Texas Court of Civil Appeals for the Tenth Supreme Judicial District of Texas wrote the initial appellate opinion concerning the Reinsurance treaty and since the Alabama Supreme Court felt compelled to recite said opinion as a justification for approving the treaty, it is imperative that the constitutional issues raised by the ruling of the Texas Court be examined with care. The Petitioners have challenged in detail the basis for the Texas Court's approval of the treaty to-wit: that the differences in treatment are based upon real and substantial differences. There was however no evidence presented below justifying the discriminatory treatment and establishing any rational basis for such treatment.

In addition to the unlawful discrimination caused by the Treaty, it is also clear that the Treaty has created a profit for the Reinsurer at the expense of Empire's policyholders, stockholders and creditors. Despite the Respondents' assertion that Protective Life Insurance Company will receive no profit until the moratorium imposed on cash benefits has been eliminated (Br. p. 10), Mr. Thomas K. Pennington, a Vice-President of Protective, admitted in a Federal District Court proceeding involving Empire in 1976 that: "It (the Empire Transaction) will account for roughly two percent (2%) of profits in this year." (R 1242) *Payne v. Moody* (N.D. Tex. CA-5678). It is clear therefore that the Treaty not only effectuated an unlawful discrimination among Empire's policyholders, stockholders and creditors but also created a profit for Protective at their expense.

CONCLUSION

Wherefore for the foregoing reasons, the Petitioners pray that their Petition for a Writ of Certiorari to the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas be granted.

Respectfully submitted,

FRANK G. NEWMAN
NEWMAN, SHOOK & NEWMAN
Professional Corporation
4330 Republic National Bank Tower
Dallas, Texas 75201
(214) 747-9091

FREDERICK J. LAWSON
Union Bank Plaza, Suite 414
15233 Ventura Boulevard
Sherman Oaks, California 91403
(213) 981-4100

Attorneys for Petitioners
SHEARN MOODY, JR., JOHN S. BLEKER

PROOF OF SERVICE

Proof of Service of three copies of Petitioners' Reply to Respondents' Brief in Opposition upon each of the parties separately represented by counsel was filed by FRANK G. NEWMAN, a member of the Bar of the United States Supreme Court on the same date the Reply was filed.